CASE NO. 17-73210

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO,

Respondent.

ON APPEAL FROM NATIONAL LABOR RELATIONS BOARD CASE NO. 365 N.L.R.B. NO. 126

MOTION FOR JUDICIAL NOTICE

David A. Rosenfeld, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023

Attorneys for Respondent, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REINFORCING IRON WORKERS, LOCAL 229, AFL-CIO

Respondent hereby requests this Court take judicial notice of the following documents:

A copy of the Supplemental Memorandum for the National Labor Relations Board, *IBEW v. NLRB*, 341 U.S. 694 (1951) (No. 108), 1950 U.S. S. Ct. Briefs LEXIS 3, filed by the Board in non-opposition to the granting of the Petition for Writ of Certiorari, attached as Exhibit A.

The brief of the National Labor Relations Board filed in the Supreme Court in the same case, 1951 U.S. S. Ct. Briefs LEXIS 2, attached as Exhibit B.

The reasons for this request are explained below.

This case involves a question of whether pure speech, namely the request by an agent of the Union that certain employees cease work, violates the secondary boycott provisions of the National Labor Relations Act. In particular, what is at issue is 29 U.S.C. § 158(b)(4)(i)(B).

The parties' briefing focuses on *IBEW v. NLRB*. The Board takes the unrelenting position that that case addressed non-picketing communication, as in this case, the communications between the Union's business agent and the employees on the job. The Respondent Union takes the opposite position, that the mere communication by the Union Business Agent with the employees did not violate the Act and was not addressed in *IBEW*.

Both parties have briefed the issue of whether *IBEW* addressed non-picketing communication. The Board, in its brief, relies upon *dicta* in the *IBEW* case to argue that the Court found the statute encompassed all communication, not just picketing. *See* Br. of NLRB 21-38, ECF No. 21. The Respondent Union takes the contrary position that *IBEW Local 501* addressed only picketing and not other forms of communication that did not involve picketing or threats of picketing. *See* Opening Br. of Resp't 13-18, ECF No. 12; and Resp't's Reply Br. 1-12, ECF No. 27.

This debate has continued in the various FRAP 28(j) letters presented to the Court because the Board, in response to every letter, relies upon *dicta* in *IBEW*.

The documents that have been called to the Court's attention in this Request for Judicial Notice will inform the Court of exactly what was at issue in the *IBEW* case.

First, Exhibit A is a Supplemental Memorandum filed by the Board. As reflected in that Memorandum, the Board had initially opposed the granting of certiorari in that case. It changed its position because the Supreme Court granted certiorari in a related case. In that Supplemental Memorandum, the Board stated that it understood the issue in the *IBEW* case was only whether picketing violated the Act. The issue was "Whether the picketing in this case constituted a secondary boycott in violation of Section 8(b) (4) (A) of the Act." 1950 U.S. S. Ct. Briefs LEXIS 3, at *3. There was no reference to any other communication.

The Board then briefed the issues in Exhibit B. The Board's statement of Questions Presented in pertinent part reflects that it understood that the only issue was whether picketing violated the Act:

> 3. Whether picketing to induce secondary pressure is an expression of "views, argument, or opinion" protected by Section 8(c) of the Act.
>
> 4. Whether prohibition of such picketing is an unconstitutional abridgement of free speech.

1951 U.S. S. Ct. Briefs LEXIS 2, at *10.

The Board's brief is then replete with references to the picketing. There is no suggestion whatsoever in the brief that the Board thought that the statements made by any agent of IBEW Local 501 violated the Act. It is undisputed that the Union's Business Agent, Patterson, told "one or both of [the carpentry] workmen that the electrical work on the job was being done by nonunion men." 341 U.S. at

697. Yet the Board does not suggest in its brief that that statement itself was unlawful.

The titles of each heading reflect the fact the only issue was picketing:

> B. PICKETING TO INDUCE SECONDARY STRIKES IS NOT THE EXPRESSION OF 'VIEWS, ARGUMENT, OR OPINION, FOR IT IS MORE THAN SPEECH AND IS, IN ANY EVEN, VERBAL FURTHERANCE OF AN UNLAWFUL OBJECTIVE.'

1951 U.S. S. Ct. Briefs LEXIS 2, at *47.

It is worth noting that under 3B, the Board took the position that picketing is a form of "verbal furtherance of unlawful conduct." The Board did not take the opposite position that the statements made by the Union Business Agent were, in themselves, violations or unlawful.

The Board also never asserted in its statement of "The Unfair Labor Practice Facts" that the Union agent asked any union employee to cease work. It wasn't until the Union agent put up the picket that the two employees of the carpentry contractor left the jobsite. *Id.* at *16-19. Thus, the Board, based on the facts, could not assert that the Union induced or encouraged anyone to leave except by the picket, which clearly had that effect. *Id.* at *18. There is no doubt, however, that the statements of the Union agent prove there was a secondary objective in the picketing.

The Board also pointed out that the Act does not apply to the individual employees and does not outlaw their decision to leave work; it only outlaws the secondary efforts by the Union. *Id.* at *59-65. This also emphasizes the relevance of this Court's recent Opinion in *United States v. Sineneng-Smith*, 910 F.3d 461 (9th Cir. 2018), because the encouragement or inducement was of an act itself that was a federal felony. See Letter Submitted Pursuant to FRAP 28(j), Jan. 3, 2019, ECF No. 38.

In summary, then, the Request for Judicial Notice should be granted. These two documents demonstrate that at the time *IBEW* was argued to the Supreme Court, the NLRB took the position that the picketing was unlawful and never suggested that any statements by the Union agent themselves violated the Act. Moreover, the Union agent never sought to induce or encourage any employee to cease work except when the picket was placed on the job.

Dated: January 28, 2019

Respectfully Submitted,

/s/ David A. Rosenfeld

By: David A. Rosenfeld
WEINBERG, ROGER & ROSENFELD
A Professional Corporation

Attorneys for Respondent
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REUNFORCING IRON WORKERS, LOCAL 229, AFL-CIO

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CERTIFICATE OF COMPLIANCE

This Motion for Judicial Notice complies with the type-volume limitations of Federal Rules of Appellate Procedure 27(d)(1)(E), the page limitation of Ninth Circuit Rule 27(1)(d), and the word limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). This Motion contained 984 words, excluding the portions of the Motion exempted by the rules. This Motion has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: January 28, 2019

Respectfully Submitted,

/s/ David A. Rosenfeld

By: David A. Rosenfeld
WEINBERG, ROGER & ROSENFELD
A Professional Corporation

Attorneys for Respondent
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL, AND REUNFORCING IRON WORKERS, LOCAL 229, AFL-CIO

EXHIBIT A

IBEW, LOCAL 501 v. NLRB

No. 108

Supreme Court of the United States

October Term, 1950

September 27, 1950

Reporter
1950 U.S. S. Ct. Briefs LEXIS 3 *

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A.F. OF L., AND WILLIAM PATTERSON, PETITIONERS v. NATIONAL LABOR RELATIONS BOARD

Type: Supplemental Brief: Appellee-Respondent

Prior History: ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Counsel

[*1] PHILIP B. PERLMAN, Solicitor General, DAVID P. FINDLING, Associate General Counsel. National Labor Relations Board.

Title

SUPPLEMENTAL MEMORANDUM EOR THE NATIONAL LABOR RELATIONS BOARD

Text

This memorandum is filed by the Solicitor General, on behalf of the National Labor Relations Board, for the purpose of modifying the position previously taken in the Brief for the National Labor Relations Board in Opposition to the Petition for a Writ of Certiorari in the above-captioned case.

After the filing of the petition for a writ of certiorari herein and the Government's opposition thereto, the Court of Appeals for the District of Columbia Circuit on September 1, 1950, handed down its decision in *Denver Building and Construction Trades Council, et al. v. National Labor Relations Board*, not yet officially reported, holding that it is not an unfair labor practice within the meaning of Section 8 (b) (4) (A) of the National Labor Relations Act, as amended, for a labor organization to engage in, and induce or encourage all the employees on a building job to engage in, a strike or concerted refusal to perform services in the course of their employment with an object **[*2]** of forcing or requiring the general contractor to terminate the services of a subcontractor on the job because the subcontractor employs non-union workers. We believe that the decision of the District of Columbia Circuit in this respect is in conflict with the decision of the court below in the instant case and is also in conflict with the decision of the Court of Appeals for the Sixth Circuit in *National Labor Relations Board v. Local 74, United*

Brotherhood of Carpenters and Joiners of America, pending on petition for a writ of certiorari, No. 85, this Term. [1] Because of the conflict and the importance of the question in the administration of the Act, the Government intends to petition for a writ of certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit in the *Denver* case.

Under the circumstances, the Government believes that **[*3]** this Court should review the question as to which the conflict has arisen in the instant case as well as in the *Denver* case. For this reason, we do not now oppose the granting of a writ of certiorari to review petitioner's question number 1, namely, "Whether the picketing in this case constituted a secondary boycott in violation of Section 8 (b) (4) (A) of the Act." As to all other questions urged in the petition, it continues to be the Government's position that certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,

Solicitor General,

DAVID P. FINDLING,

Associate General Counsel.National Labor Relations Board.

SEPTEMBER 1950.

End of Document

[1] We have also filed a memorandum in No. 88 modifying, as in this case, our position with respect to the granting of a writ of certiorari.

EXHIBIT B

IBEW, LOCAL 501 v. NLRB

No. 108

Supreme Court of the United States

February 21, 1951

Reporter
1951 U.S. S. Ct. Briefs LEXIS 2 *

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 501, A. F. OF L., AND WILLIAM PATTERSON, PETITIONERS v. NATIONAL LABOR RELATIONS BOARD

Type: Initial Brief: Appellee-Respondent

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Counsel

[*1] PHILIP B. PERLMAN, Solicitor General., GEORGE J. BOTT, General Counsel, DAVID P. FINDLING, Associate General Counsel, MOZART G. RATHER, Assistant General Counsel, BERNARD DUNAU, Attorney, National Labor Relations Board.

Title

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Text

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947, (**[*9]** 61 Stat. 136, 29 U.S.C., Supp. III, 141, *et seq.*), are set forth in the Appendix to petitioners' brief, pp. 108-115.

OPINIONS BELOW

The opinion of the court below (R. 323-332) is reported at *181 F. 2d 34.* The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 295-300, 241-284) are reported at *82 NLRB 1028.*

JURISDICTION

The decision of the court below was issued on February 24, 1950, and its decree enforcing the Board's order was entered on April 6, 1950 (R. 323, 336-337). The petition for a writ of certiorari was filed on June 2, 1950, and was granted on December 11, 1950. The jurisdiction of this Court is invoked under Section 10 (e) of the National Labor Relations Act, as amended, and under *28 U.S.C. 1254 (1)*.

QUESTIONS PRESENTED

The Board found that petitioners conducted a secondary boycott in violation of Section 8 (b) (4) (A) of the Labor Management Relations Act by inducing and encouraging employees of Deltorto, a subcontractor, to engage in a strike or concerted refusal to perform **[*10]** services for their employer, an object thereof being to force Giorgi, the general contractor, to cease doing business with another subcontractor, Langer, both of whom have their principal place of business in New York. Petitioners' primary dispute was with Langer, a non-union contractor. Petitioners induced or encouraged the boycott by picketing at the situs of a construction project at Greenwich, Connecticut, on which all three contractors were engaged, but at a time when only the employees of Deltorto were working. The questions presented are:

1. Whether the unfair labor practices found affect commerce within the meaning of the Act.

2. Whether the action of petitioners constituted an exertion of secondary pressure forbidden by Section 8 (b) (4) (A).

3. Whether picketing to induce secondary pressure is an expression of "views, argument, or opinion" protected by Section 8 (c) of the Act.

4. Whether prohibition of such picketing is an unconstitutional abridgment of free speech.

5. Whether the Board's order is unduly broad.

STATEMENT

Upon the usual proceedings under Section 10 of the Act, the Board, on April 12, 1949, issued its findings of fact, conclusions of **[*11]** law, and order (R. 295-300, 240-284). The pertinent facts may be summarized as follows: [1]

I. THE BOARD 's FINDINGS OF FACT

A. The Commerce Data

In December 1947, Giorgi Construction Company, a partnership having its place of business at Port Chester, New York, entered into a general contract for the construction of a private dwelling house in Greenwich, Connecticut (R. 245-246; 39-40). The contract price of the house was $ 15,000 (*ibid.*). Giorgi performed part of the work, for the most part masonry work, with his own employees (*ibid.*). Giorgi subcontracted the electrical work on the house to Samuel Langer, an electrical contractor whose place of business is in Port Chester, New York (R. 247; 40-41, 56), and subcontracted the carpentry work to Nicholas Deltorto, a carpenter contractor also located at Port Chester (R. 247; 41).

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[1] In the fallowing statement record references which precede the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

In the **[*12]** construction of the house, Giorgi used various masonry materials valued at approximately $ 1,800 (R. 246; 54). These materials were purchased by Giorgi from a New York concern, F. C. Mertz & Son, which delivered the materials from Port Chester, New York, to the construction site in Connecticut (R. 246; 42). As a "top" purchaser of Mertz, Giorgi bought about $ 15,000 worth of masonry material from him in 1947, which Giorgi utilized to fulfill construction contracts totalling some $ 60,000 in 1947 (R. 246; 38-39, 133), Mertz himself, in 1947, purchased materials valued at $ 290,000, of which 30 percent was extra-state in origin, and sold $ 375,000 worth of material, of which 15 percent was to customers outside New York State (R. 246; 131-132).

In fulfillment of his $ 7,400 subcontract, Deltorto, the carpenter contractor, purchased materials from Interstate Lumber and Mill Corporation, a Connecticut firm, and these materials comprised part of Deltorto's annual purchases of nine to ten thousand dollars from Interstate (R. 247; 1607 126-127). Interstate in turn, in 1947, purchased $ 700,000 worth of material, such as lumber and millwork, of which 90 percent was secured from sources **[*13]** outside Connecticut, and 15 to 20 percent of Interstate's sales were made to customers in New York (R. 247; 126-129).

As to Langer, the electrical subcontractor, his subcontract for electrical work on the house was $ 325 (R. 247; 53). Langer's business in general consists of the installation of electrical wiring fixtures, and equipment for light and power, in new construction, including homes, commercial holdings, and industrial plants; maintenance of electrical equipment in industrial plants; and miscellaneous installation, repair, and replacement of electrical fixtures and equipment (R. 248; 56-57). Langer's total business from July 1, 1947 to July 1, 1948, the period pertinent to these proceedings, amounted to about $ 24,443 (R. 248; 57). Langer estimated that the total cost of the various new construction jobs on which he did electrical work in 1947 was about $ 650,000, and that the cost of the materials on these jobs was about $ 260,000 (R. 248, n. 13; 58-60).

During the period between July 1, 1947 and July 1, 1948, Langer purchased about $ 8,095 worth of materials (R. 248; 61), of which about $ 5,095 worth were secured by Langer from points outside the State of New York (R. **[*14]** 248; 61). During the same period, Langer performed work outside New York, all of it on jobs in Connecticut, valued at about $ 8,402 (R. 248-249; 61). Materials for those Connecticut jobs, one of which was the house here involved, were transported by Langer from his Port Chester shop to Connecticut sites (R. 249; 61-62). Langer estimated that the value of the material thus transported from New York to Connecticut was approximately $ 2,700 (R. 249; 62).

In 1947, of the two wholesale electrical suppliers from whom Langer bought his material, Mar Le Company, a Connecticut firm, bought 90 percent of its $ 600,000 purchases from extra-state sources, and 25 percent of its $ 800,000 sales was to customers outside Connecticut, while Max Goldman, Inc., a New York firm, bought 70 percent of its $ 321,000 purchases from outside New York, and 2 percent of its $ 368,000 sales were extra-state (R. 249-250; 134-135, 139-140). Goldman's sales of $ 2,575 worth of supplies to Langer were equal to or greater than its sales to 80 percent of its customers (R. 249; 140), and Mar Le's sales of $ 6,000 worth of supplies to Langer were four times as great as its average sales per customer (R. 249, **[*15]** n. 15; 135-136). In addition to Langer's purchases from interstate enterprises, Langer performed electrical work for firms engaged in the production of goods for interstate commerce (R. 250-251; 141-143, 144-146, 149-152).

The operations pertaining to this house construction job, the Board found, are part of "the web of commerce involved in the building and construction industry generally" which "is nation-wide in scope,

involves large interchanges of materials in interstate commerce, is highly complex in its requirements as to materials, has ramifications substantially affecting numerous and varied types of production activity, and accounts annually for an aggregate expenditure of many billions of dollars * * *" (B. 251, n. 21; 214-227). Thus, "the value of all construction work in the United States during 1946 was $ 15,667,000,000. New construction accounted for $ 10,007,000,000 of that total, of which $ 3,300,000,000 was for new private residential construction" (B. 251, n. 21; 215). Although huge in the aggregate, in 1939, of the total number of establishments in the construction industry, 87.2 percent did an annual business of less than $ 25,000 for each establishment **[*16]** (R. 220). [2]

B. The Unfair Labor Practice Facts

Petitioner, International Brotherhood of Electrical Workers, Local 501, A. F. of L. (hereinafter referred to as the IBEW) is a labor organization, which has its principal office at Mt. Vernon, New York, and is engaged in promoting and protecting the interests of its members. (R. 254; 6, 11). Its business representative or agent is petitioner William Patterson (R. 254; 7, 11). Prior to entry into the contract for the construction of the house, the IBEW had become involved in a dispute with Langer because lie was operating as a non-union electrical contractor (R. 256, n. 32; 63-76, 92-93).

The construction of the house was begun in the middle of December 1947 (R. 245-246; 40). By the middle of April 1948, Langer's two electricians, neither of whom was a member of the IBEW (R. 256; 77), had completed the roughing-in part of the electrical work on **[*17]** the house (R. 256; 77).

After Langer's electricians had completed the roughing stage of the electrical work, which must be done before the walls of the house can be finished, petitioner Patterson, the IBEW's business representative, visited the Greenwich house (R. 257; 160-161). He talked with Nicholas Deltorto, whose two carpenter employees, Ralph Ciancia and Angelo Bova, both members of the Carpenters union, were the only men then at work on the job (R. 257; 159-161). Patterson told Deltorto that the electrical work was being done by a non-union contractor (*ibid.*). Deltorto stated that he did not know who was doing the electrical work (*ibid.*). Patterson then asked Ciancia, one of the carpenters, if he knew that the job was non-union (R. 257; 177-178). Ciancia replied that he did not know that there were non-union men on the job (*ibid.*).

On April 16, Patterson again visited the Greenwich house when Deltorto, Ciancia, and Bova were the only ones present (R. 258; 161). Ciancia and Bova were working together on a scaffold at the time (R. 258; 183). Patterson talked only with Deltorto, but Bova, at least, overheard some of the conversation (R. 258; 183). Patterson, **[*18]** in substance, told Deltorto that the job was unfair because the electrical work was being done by a non-union organization (R. 258; 162). Deltorto again replied that he "didn't know about that" (*ibid.*). Patterson commented that he "was sorry," and within 5 minutes began to picket the house with a placard which read, "This job is unfair to organized labor; IBEW 501 AFL" (R. 258; 162).

When Bova noticed Patterson with the placard, he suggested to his fellow carpenter Ciancia that they get down off the scaffold to "see what it's all about" (R. 258-259; 183). After they had read the legend on the placard, Bova said that he did not know what to do. Ciancia stated, "There's only one thing to do. Let's go home" (*ibid.*). Thereupon, the two employees informed Deltorto that they were stopping work (R. 258-259; 162, 180, 183). All three then left the construction site (*ibid.*). Thereafter Deltorto informed the general contractor, Giorgi, that "his carpenters had walked off the job because the electrical delegate had

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[2] See also, *Shore v. Building and Construction Trades Council, 173 F.2d 678, 681* (C.A. 3).

picketed the job" (R. 259; 44). Giorgi replied that he would have the matter "straightened out" (R. 259; 165).

That night Patterson notified Giorgi that Danger was "unfair" **[*19]** and that he "would have to replace Samuel Langer with a union contractor in order to complete the job," and that if Giorgi did not replace Langer he "would probably not receive any skilled trades to finish the rest of the work." (R. 259; 46-47).

On April 17, Giorgi notified Langer of what had happened and informed him that in order for Giorgi to finish the house and get his money, Giorgi would have to obtain a union electrical subcontractor to do the rest of the electrical work (R. 259; 46, 77-78). Langer agreed to release Giorgi from his contract, stating that he would step aside so that a union contractor could take over (*ibid.*). Thereafter, Langer performed no further work on the Greenwich house and Giorgi made arrangements with a union electrical subcontractor to finish the electrical work (R. 259-260; 48). Several days later Giorgi informed Deltorto that the trouble on the Greenwich house had been "straightened out" (R. 259-260; 165). Thereupon, Deltorto's carpenters returned to work on the project (*ibid.*).

II. THE BOARD'S CONCLUSIONS

The Board found that the operations pertaining to the construction job affect commerce within the meaning of the Act (R. 296, **[*20]** 251-254). [3] The Board further found that petitioners, by picketing the construction job, induced or encouraged the employees of Deltorto, a subcontractor of Giorgi, the general contractor, to engage in a strike or concerted refusal in the course of their employment to perform services for Deltorto, an object thereof being to force or require Giorgi to cease doing business with Langer, another subcontractor on the same construction job (R. 297). The Board held that the picketing was not exempted from the reach of Section 8 (b) (4) (A) by Section 8 (c)? stating that (R. 297): " Section 8 (b) (4) (A) prohibits peaceful picketing, as well as other means of inducement or encouragement, in furtherance of an objective proscribed therein, and * * * Section 8 (c) does not immunize such conduct." [4] Accordingly, the Board concluded that petitioners' conduct was in violation of Section 8 (b) (4) (A) of the Act (*ibid.*).
[*21]

III. THE BOARD'S ORDER

The Board ordered petitioners to cease and desist from inducing or encouraging the employees of Deltorto or any employer, by picketing or related conduct, to engage in a strike or a concerted refusal in the course of their employment to perform any services, where an object thereof is to force or require Giorgi Construction Company or any other employer or person to cease doing business with Langer (R. 297-298). The order also requires petitioners to post the customary notices of compliance (R. 298).

IV. THE DECISION BELOW

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[3] The Board explained (R. 296) that it would assert jurisdiction here "for the reasons stated in the majority opinion in the Watson case." (*Local 74, United Brotherhood of Carpenters, et al, v. National Labor Relations Board*, certiorari granted, No. 85, this Term). The two dissenting members of the Board stated that, because the case involved "ail essentially local enterprise with only the most remote effect upon commerce," they would, as a discretionary matter, refuse to assert jurisdiction (R. 299).

[4] The Board adopted by reference (R. 297, n. 5) the reasoning set forth in its earlier opinion in *Wadsworth Building Co., Inc., 81 NLRB 802, 807-816.*

On May 16, 1949, petitioners filed in the court below a petition to review and set aside the Board's order (R. 301-310), and on June 24, 1949, the Board filed its answer requesting enforcement of its order (R. 313-317). On February 24, 1950, the court below handed down its opinion (R. 323-335) and on April 6, 1950, entered its decree (R. 336-337) enforcing the Board's order. **[*22]** Judge Clark dissented (R. 332).

SUMMARY OF ARGUMENT

I

The business activities of Langer and Giorgi, on this project as well as generally, involve a substantial interstate movement of materials and men. The secondary boycott here, which directly affected such movement, was clearly subject to the Board's jurisdiction. See also the Board's Brief in *Local 74 v. National Labor Relations Board*, No. 85, this Term, pp. 23-47.

II

By inducing the employees of subcontractor Deltorto to refuse concertedly to perform any services for their employer, an object being to force Giorgi, the general contractor, to cease doing business with subcontractor Langer, with whom it was engaged in a labor dispute, the IBEW made "its sanctions bear, not on the employer who alone is a party to the dispute, but upon some third party who has no concern in it," and that is the "gravamen of a secondary boycott" (R. 327). See also the Board's Brief in *National Labor Relations Board v. Denver Building mid Construction Trades Council*, No. 393, this Term, pp. 20-66.

III

Section 8 (c) does not remove from the reach of Section 8 (b) (4) (A) the picketing by which IBEW induced Deltorto's employees **[*23]** to exert secondary pressure on Giorgi.

A. To exempt peaceful picketing for an illegal objective from the reach of Section 8 (b) (4) (A) distorts its text, context, and purpose. On their face the words "induce or encourage" embrace every form of influence and persuasion designed to promote secondary pressure. Both the proponents and opponents of its enactment read them to have this effect. And it can hardly be supposed that Congress, in condemning secondary pressure, intended to permit the continuance of one of the most effective means to that end, simply because it was "peaceful picketing."

Furthermore, if the words "induce or encourage" employees are qualified, as petitioners urge, by the words "by threat of reprisal or force or promise of benefit," which appear in Section 8 (c), Section 8 (b) (4) (A) would reach only the same conduct already condemned as "restraint and coercion" of employees in Section 8 (b) (1) (A). Congress could not have intended so sterile a construction. That the qualifying language of Section 8 (c) was not meant to apply to Section 8 (b) (4) (A) is apparent from the fact that the same conduct denominated an unfair labor practice by Section 8 (b) **[*24]** (4) (A) was made actionable in a civil suit by Section 303 of Title III, Labor Management Relations Act, 1947. No provision comparable to Section 8 (c) qualifies the words "induce or encourage" as they appear in Section 303,

In Section 8 (b) (4) (A), as in Section 303, Congress was concerned with a particular objective, and not with the character of the means used to accomplish that objective. To permit attainment of the forbidden objective merely because the means were not themselves unlawful, would defeat the very purpose of the provision.

B. Petitioners' argument rests on two mistaken assumptions: (1) picketing is pure speech, of the sort comprehended by the words "views, argument, or opinion"; and (2) verbal furtherance of an unlawful objective was regarded by Congress as simply an expression of "views, argument, or opinion."

1. Picketing is more than the expression of "views, argument, or opinion"; it also has coercive features. Not "being the equivalent of speech as a matter of fact," picketing "is not its inevitable legal equivalent" (*Hughes v. Superior Court, 339 U.S. 460, 465);* and it cannot be assumed that Congress meant Section 8 (c) to be **[*25]** construed otherwise, particularly if the result would be to immunize picketing in furtherance of secondary strikes, which Congress unquestionably intended to outlaw.

2. Even if picketing could be regarded as "views, argument, or opinion," it still would not be protected by Section 8 (c) when used to further an unlawful secondary boycott. Union inducement of employees to exert secondary pressure falls into the category of statements which are in themselves unlawful or incite to unlawful action. Such utterances can invoke no appeal to the statutory protection of "views, argument, or opinion," It is a doctrine of long standing that the instigator of a wrong, whether the wrong be a crime, a tort, or a breach of contract, is as culpable as the actual perpetrator. And there is no evidence that Congress intended, by enacting Section 8 (c), to reject this doctrine so well established in the law. The circumstance that, unlike a union, employees may individually yield to the inducement without themselves being chargeable with an unfair labor practice does not legalize concerted secondary pressure exerted by a union. The immunity of individual employees rests upon the expressed desire **[*26]** of Congress not to expose them either to the pecuniary hazards of a damage suit or to any risk of involuntary servitude which might be entailed in a Board order requiring individual desistance from a refusal to work.

C. No disparity in the application of Section 8 (c) as between unions and employers results from this construction. Both unions and employers are required to desist from incitement to unlawful action. And in determining the nature of the action induced by utterances of employers, no less than of unions, consideration is given not only to the statement but also to the relevant circumstances. That this result is consistent with the objectives of Congress appears from the legislative history which shows that the problem which Congress dealt with in Section 8 (c) related entirely to speech for lawful ends. See 93 Cong. Rec. 3837, 2 Leg. Hist. 1011. The only purpose of Section 8 (c) was to put an end to a supposed practice whereby the Board had condemned as coercive, or had considered as evidence of unfair practices, non-coercive expressions aimed at a legitimate goal, merely because the speaker had committed other unfair labor practices, remote in time and unconnected **[*27]** by circumstances to the utterances.

D. Prohibition of picketing in furtherance of secondary pressure entails no unconstitutional abridgment of free speech. Congress clearly has the right to prevent the substantive evil of secondary boycotts. Picketing to accomplish a forbidden objective has a substantial and present propensity of bringing about the substantive evil. The legislative judgment embodied in Section 8 (b) (4) (A) does not rest merely upon an absence of an immediate employer-employee relationship. And the interdependence of economic interest of those engaged on a common construction job does not prohibit Congress, as a matter of constitutional power, from extending protection against secondary boycotts to each of the individual contractors adversely affected by such boycotts.

IV

The Board's order is tailored to the precise violation found and does no more than enjoin petitioners from exerting the same kind of economic pressure against Langer through other employers as they exerted upon

Langer through Giorgi and Deltorto in the instant case. Petitioners' fears that the order is unduly broad are unfounded.

ARGUMENT

I. THE OPERATIONS PERTAINING TO THE CONSTRUCTION **[*28]** JOB AFFECT COMMERCE

The Board's Brief in *Local 74 v. National Labor Relations Board* (the *Watson* case), No. 85, this Term, pp. 23-47 contains a discussion of the applicable principles which support the Board's exercise of jurisdiction in the instant case as well as in the *Watson* case and the *Denver* case, No. 393, this Term, both under the Act and tinder the Commerce Clause. "We supplement that discussion here only by quoting the pertinent passage of Chief Judge Learned Hand's opinion for the court below (R. 325-326):

> It is now abundantly established that in the Labor Relations Acts Congress meant to exercise to the fullest extent its power over interstate commerce; * and there can no longer be any doubt that the constitutional scope of that power covers occasions such as this. Langer's activities would alone be enough. In order to perform Ms part of the work, small though it was, he had to go from New York to Connecticut; and the materials which he used upon the job he had to bring from New York. Besides, his general business required him continuously to import substantial amounts of material from other states into New York, and he did a substantial amount of work **[*29]** in Connecticut in addition to the job in question, as well as work for large contractors whose own interstate activities were very large indeed. Giorgi's headquarters were also in New York, whence, like Langer, he had to travel to Greenwich to supervise his employees; moreover, the materials which he used upon the job he had brought from New York; and his business, again like Langer's, extended into other states in substantial amount. It was Patterson's purpose to put an end to Langer's activities on the house by preventing Deltorto from proceeding with his contract and thus compelling Giorgi to get rid of Langer. It is idle to argue therefore that Patterson's acts did not immediately "affect," or that they were not designed to "affect," these interstate activities. Insignificant as they were, they were enough to satisfy the demands of the Act,**
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> * *N.L.R.B. v. Fainblatt, supra, 606;* **[*30]** *306 U.S. 601.*
>
> ** *Polish National Alliance v. N.L.R.B., supra, 322 U.S. 643.*

II. PETITIONERS' ACTIVITY CONSTITUTED AN UNLAWFUL EXERTION OF SECONDARY PRESSURE WITHIN THE MEANING OF SECTION 8 (b) (4) (A) OF THE ACT

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* *N.L.R.B. v. Jones & Laughin Steel Corp., 301 U.S. 1; N.L.R.B. v. Fainblatt, 306 U.S. 601; Polish National Alliance v. N.L.R.B., 322 U.S. 643; United Brotherhood v. Sperry, 170 Fed. (2) 863, 867* (C.A. 10).

* *N.L.R.B. v. Jones & Laughin Steel Corp., 301 U.S. 1; N.L.R.B. v. Fainblatt, 306 U.S. 601; Polish National Alliance v. N.L.R.B., 322 U.S. 643; United Brotherhood v. Sperry, 170 Fed. (2) 863, 867* (C.A. 10).

* *N.L.R.B. v. Jones & Laughin Steel Corp., 301 U.S. 1; N.L.R.B. v. Fainblatt, 306 U.S. 601; Polish National Alliance v. N.L.R.B., 322 U.S. 643; United Brotherhood v. Sperry, 170 Fed. (2) 863, 867* (C.A. 10).

* *N.L.R.B. v. Jones & Laughin Steel Corp., 301 U.S. 1; N.L.R.B. v. Fainblatt, 306 U.S. 601; Polish National Alliance v. N.L.R.B., 322 U.S. 643; United Brotherhood v. Sperry, 170 Fed. (2) 863, 867* (C.A. 10).

In the Board's Brief in *National Labor Relations Board v. Dower Building and Construction Trades Council* (the *Denver* case), No. 393, this Term, pp. 20-66, we have discussed in detail the criteria which the Board has applied in determining' whether picketing and other strike pressures, in common-situs cases such, as this, are secondary and hence violative of Section 8 (b) (4) (A), or primary and hence lawful. We summarize here the considerations which led the Board to conclude **[*31]** that the picketing in the instant case was designed to bring strike pressure to bear upon employers other than Langer, the primary employer, and was therefore secondary and prohibited.

The primary dispute in this case was between the IBEW and Langer; its subject was the employment by Langer of non-union electricians, [5] The ultimate object of the union, as the facts set forth in the Statement, *supra*, pp. 7-10, show, was to force Langer off the job. In effecting this purpose, the IBEW by-passed Langer and his employees altogether, and brought pressure to bear entirely upon other employers and their employees. At no time during construction of the house did the IBEW approach Langer or his employees directly and seek either to induce his employees to join the Union or to induce Langer to withdraw. Instead, after informing Deltorto, the carpenter contractor, of the IBEW's objection to Langer, the IBEW's representative picketed the construction site at a time when only Deltorto's employees were working. The picketing, therefore, took place at a time when its sole purpose was to influence employees of Deltorto, with whom the IBEW had no dispute other than that involved in **[*32]** his working on the same job as Langer, to strike. This purpose is further evidenced by the fact that the picketing placard characterized the entire job, rather than Langer alone, as unfair. When the picketing induced Deltorto's employees to leave the job in concert, Deltorto informed Giorgi, the general contractor, of the interruption of work "because the electrical delegate had picketed the job" (*supra*, p. 9). The same evening, the IBEW representative told Giorgi that he "would have to replace Samuel Langer with a union contractor in order to complete the job," and that if Giorgi did not replace Langer, he "would probably not receive any skilled trades to finish the rest of the work" (*supra*, pp. 9-10). As with Deltorto, the IBEW had no dispute with Giorgi other than that which flowed from his engagement of Langer, As a result of the pressure exerted through the successful inducement of Deltorto's employees, Giorgi's contract with Langer was cancelled by mutual assent and, arrangements having been made to complete the electrical work with a union contractor, Deltorto's employees returned to work.

[*33]

Thus, as the court below observed, the IBEW made its " sanctions hear, not upon the employer who alone is a party to the dispute, hut upon some third party who has no concern in it," and that is the "gravamen of a secondary boycott" (R. 327),

III. SECTION 8 (c) DOES NOT IMMUNIZE VERBAL INSTIGATION OR FURTHERANCE OF SECONDARY STRIKES FORBIDDEN BY SECTION 8 (b) (4) (A)

As has been stated, in order to compel Giorgi, the general contractor, to dispense with the services of Langer, the non-union electrical subcontractor, the IBEW induced two employees of Deltorto, another subcontractor on the same job, to refuse concertedly to perform any services for Deltorto. The inducement was accomplished by the patrol of a single picket bearing the placard, "This job is unfair to organized labor; IBEW 501 AFL" (*supra*, p. 9). Petitioners contend that, "even if it is assumed that [this conduct] constituted a violation of Section 8 (b) (4) (A) of the Act, and such application of the Act is constitutional,

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[5] It may well be that Langer's operation as a non-union contractor was necessitated by the IBEWs refusal to admit his employees to union membership (R, 63-76, 92-93, 112-123).

nevertheless there was no basis for issuance of the order in this case because under "Section 8 (c) of the Act the picketing under the facts of this case could not constitute **[*34]** evidence of such violation" (Br., p, 68).

Section 8 (c) provides that:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an un fair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

The Board held in this case that "Section 8 (b) (4) (A) prohibits peaceful picketing, as well as other means of inducement or encouragement, in furtherance of an objective proscribed therein, and that Section 8 (c) does not immunize such conduct" (R. 297). In explanation of its conclusion, the Board cited its earlier decision in *Wadsworth Building Co., Inc., 81 NLRB 802* (R. 297, n. 5), In enforcing the Board's order in that case, the Court of Appeals for the Tenth Circuit affirmed the view, as did the court below in this case (R. 328-331), that Section 8 (c) does not " create an asylum of immunity from the proscription of Section 8 (b) (4) (A) * * *." *National Labor Relations Board v. United Brotherhood of Carpenters and Joiners of America, 184 F. 2d 60, 62* **[*35]** (C-A. 10), pending on petition for certiorari, No, 387, this Term. Accord: *United Brotherhood of Carpenters and Joiners of America v. Sperry, 170 F. 2d 863, 868-869* (C.A. 10); *Printing Specialties and Paper Converters Union v. LeBaron, 171 F. 2d 331, 334* (C.A. 9).

We shall show (1) that to immunize picketing, where its purpose is to promote secondary strikes, does violence to the text of Section 8 (b) (4) (A), its place in the statutory scheme, and the objective it is designed to serve; (2) that as an element of secondary pressure, picketing is not the expression of "views, argument, or opinion" within the meaning of Section 8 (c), for (a) picketing has aspects of compulsion which induce action apart from the nature of the information imparted, and (b) even as utterance alone, it is a means of furthering the attainment of an unlawful objective, which traditionally has no claim to immunity as speech; (3) that the function of Section 8 (c) is to safeguard uncoercive speech which is designed, not to induce prohibited conduct, but to influence action which can lawfully be taken; and (4) that no unconstitutional abridgment of the right of free **[*36]** speech flows from prohibiting verbal instigation or furtherance of secondary strikes in labor controversies.

A. THE TEXT, CONTEXT, AND PURPOSE OF SECTION 8 (b) (4) (A) PRECLUDE ELIMINATION OF SECONDARY PICKETING FROM THE STATUTORY BAN

Petitioners do not deny that picketing does "induce or encourage" employees to engage in work stoppages prohibited by Section 8 (b) (4) (A). They rely solely on the immunity which Section 8 (c) extends to the expression of " views, argument, or opinion." As we shall show, however, to regard picketing designed to provoke secondary strikes as an expression of "views, argument, or opinion," and hence not reachable by Section 8 (b) (4) (A), distorts the text, context, and purpose of Section 8 (b) (4) (A).

1. *The text of Section 8 (b) (4) (A)*: On their face the words "induce" and "encourage" in Section 8 (b) (4) (A) comprehend every form of influence and persuasion designed to promote secondary strikes. As the Board observed, these "words of broad connotation" produced no disagreement in Congress as to their "sweeping implications and meaning," and both opponents and proponents of Section 8 (b) (4) (A) read

them "to prohibit peaceful **[*37]** picketing, as well as persuasion and encouragement to further a secondary boycott." *Wadsworth Building Co., Inc., 81 NLRB, at 808, 810.* [6]

A single illustration from the legislative history will suffice to show the comprehensive scope which the legislators attributed to the words "induce" and "encourage. **[*38]** " In opposing the enactment of Section 8 (b) (4) (A), Senator Pepper stated that it would prohibit workers, on strike because of the substandard employment conditions prevailing at the plant at which they work, from "appealing" to employees at another plant to "stand by them in their struggle to hold up and defend the working standards with respect to which they are engaged in a controversy," by refraining from handling the product of the struck plant; "this provision," he said, "would make that activity unlawful, even though by *peaceful methods or means they tried to persuade* those workers to accomplish, with them, that objective." [7] In reply, Senator Taft agreed that such activity would be banned, for it "is similar to that in the case of the New York Electrical Workers' "Union," a reference to conduct described in *Allen Bradley Co. v. Local Union No. 3, 325 U.S. 797.* [8] That conduct entailed "the traditional labor weapons of refusal to work upon disfavored goods, *with peaceful and non-violent persuasion, picketing, and blacklisting*, and now the active participation of the local employers." [9] Despite its element of peaceful picketing, the *Allen* **[*39]** *Bradley* case was repeatedly mentioned throughout the legislative deliberation upon Section 8 (b) (4) (A) as illustrating the type of labor activity to be banned. [10] At no time during the course of debate did either proponents or opponents of the Act suggest that Section 8 (c) was designed or intended to frustrate this objective, or that that would be its effect, see pp. 45-55, *infra*.
[*40]

It is plain, therefore, that Congress intended to prohibit even peaceful picketing in furtherance of an illegal secondary boycott. Indeed, "it can hardly be supposed that Congress, in enacting Section 8 (b) (4) (A) as the legislative response to the asserted evils of secondary boycotts, did not envisage the whole gamut of union activities by which such boycotts are achieved* Obviously, picketing, though peaceful, as one of the most effective forms of economic pressure, must have been within the contemplation of Congress as one of the practices to be curbed by that provision." *Wadsworth Building Co., Inc., 81 NLRB 802, 810-811.*

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[6] *E.g.*, statements of Senator Taft, 93 Cong. Rec. 4198-99, in 2 Leg. Hist 1106-08; Senator Pepper, 93 Cong. Rec. 4197-99, in 2 Leg. Hist. 1103-09; Senator Murray, 93 Cong. Rec. 4844, in 2 Leg. Hist. 1366. See also, S. Rep. No. 105, 80th Cong., 1st Sess., Minority Views, 19, in 1 Leg. Hist. 481; *Hearings before the Committee on Labor and Public Welfare, United States Senate, on S. 55 and S. J. Res. 22*, 80th Cong., 1st Sess., 60-63, 1496-97, 1717-18, 1732-33, 1801, 2060-61, 2148; *Hearings before Committee on Education and Labor, House of Representatives, on Bills to Amend and Repeal the National Labor Relations Act*, 80th Cong., 1st Sess., 477, 539, 547-49, 2149-50, 2572-86, 2691.

[7] 93 Cong. Rec. 4198, in 2 Leg. Hist. 1106-1107. (Emphasis supplied.)

[8] 93 Cong. Rec. 4199, in 2 Leg. Hist. 1107.

[9] *Allen Bradley Co. v. Local Union No. 3.*, *145 F. 2d 215, 219* (C.A. 2). This Court, in its opinion in the *Allen Bradley* case, referred to the Second Circuit's opinion for a more detailed statement of the case *(325 U.S. at 798).* The injunction ultimately entered in the *Allen Bradley* case forbade "Inducing or seeking or attempting to induce" certain "prohibited overt acts" *(164 F. 2d 71, 74 and n. 3).*

[10] S. Rep. No. 105, 80th Cong., 1st Sees., 22, in 1 Leg. Hist. 428; 93 Cong. Rec. 4132, 4199, 4439, 4837, 5011, in 2 Leg. Hist. 1056, 1107, 1213, 1354, 1491. See the Board's brief in*National Labor Relations Board v. International Rice Milling Co.*, No. 313, This Term, pp. 28-29 and n. 17.

2. *The statutory context of Section 8 (b) (4) (A)*: As the Board observed, in contrast to the broad connotation of the words "induce or encourage," "Congress used more restrictive terminology * * * in other provisions of the Act. Thus, for example, the unfair labor practice is worded in Section 8 (b) (1) as 'to restrain or coerce' employees; in Section 8 (b) (2) as 'to cause or attempt to cause an employer'; [11] in Section 8 (b) (5) as to 'require of employees'; and in Section 8 (b) (6) as 'to cause or attempt to cause an employer'. **[*41]** " *Wadsworth Building Co., Inc., 81 NLRB 802, 808.* [11a]
[*42] [*43]

The relationship between Section 8 (b) (1) (A) and Section 8 (b) (A) is particularly indicative of the unrestricted reach of inducement and encouragement. To qualify Section 8 (b) (4) by Section 8 (c) is in effect to read the words "induce or encourage" as modified by the words by "threat of reprisal or force or promise of benefit." The effect of such qualification is that Section 8 (b) (4) (A) would reach the same verbal conduct already condemned by Section 8 (b) (1) (A) as "restraint or coercion." (Board's Br., *National Labor Relations Board v. International Rice Milling Co.*, No. 813, This Term, pp. 39-42.) The Board noted the incongruity of attributing to Congress an intent to do "such a meaningless thing as to make conduct, which it had already prohibited in an earlier section * * *, an unfair labor practice in a later section * * * conditioned, however, on further proof of unlawful objective." *81 NLRB, at 813.*

Furthermore, the Board observed that Section 303 of Title III of the Labor Management Relations Act, 1947, "authorizes civil suit for damages arising out of the unfair labor practices defined in Section 8 (b) (4) and reenacted verbatim in Section **[*44]** 303" *(81 NLRB at 814).* However, no provision comparable to Section 8 (c) exists to qualify the words "induce or encourage" as they appear in Section 303. Senator

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* * * *

[11] The legislative history of Section 8 (b) (2) is especially illustrative of the "narrower scope"*(81 NLRB at 808)*the words there used. As originally passed by the Senate, the words employed in 8 (b) (2) were "to persuade or attempt to persuade an employer." H.R. 3020, 80th Cong., 1st Sess., Sec. 8 (b) (2) (May 13, 1947), in 1 Leg. Hist. 239-40. Those words were changed to "cause or attempt to cause" in order to make the language consistent "with the provisions guaranteeing all parties freedom of expression." 93 Cong. Rec. 6443, in 2 Leg. Hist. 1539. The Board observed that no comparable rewording of*Section 8 (b) (4) was made. 81 NLRB at 814.*

However, since picketing "has aspects which are more than speech," its use to promote the "unlawful objective" defined by Section 8 (b) (2) is banned, but other verbal blandishment, though amounting to inducement or encouragement, may not be sufficient to be an "attempt to cause." *Henry Shore, 90 NLRB No. 224, 26 LRRM 1382, 1383.* To the extent that the court below is of the view that inducement under 8 (b) (4) is always coequal with an "attempt to cause" when employed to achieve an 8 (b) (2) objective (R. 328-329), the Board is not in agreement.

[11a] The pertinent portions of Section 8(b) are as follows:

"It shall be an unfair labor practice for a labor organization or its agents--

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 * * *

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed."

Taft explained that the definition in Section 303 "is exactly the same as the definition we had of an unfair labor practice." 93 Cong. Rec. 4858, 2 Leg. Hist. 1371. It would be anomalous if the inducement sufficient to sustain an award of damages in a federal district court would be insufficient to warrant an order requiring its discontinuance before the Board. Cf. *United States v. Hutcheson, 312 U.S. 219, 234-235.* Obviously "Congress intended to give both sections the same scope and meaning" *(81 NLRB 814),* for "a right of suit for damages" was designed to supplement the "injunctive remedy through the National Labor Relations Board" (93 Cong. Rec. 4858, 2 Leg. Hist. 1371). To achieve this result, it is necessary to read Section 8 (b) (4) as embracing peaceful picketing.

3. *The objective of Section 8 (b) (4) (A)*: In this provision Congress outlawed the exertion of secondary pressure in labor disputes. (Board's Brief, *National Labor Relations Board v. International* **[*45]** *Rice Milling Co.*, No. 313, this Term, pp. 26-34.) Picketing, as the Board observed, is the customary means of enlisting "the support of others to bring economic pressure to bear on an employer." *Wadsworth Building Co., Inc., 81 NLRB 802, 811.* To ban the wrong but permit its inducement "would be to impute to Congress an incongruous intent to permit, through indirection, the accomplishment of an objective which it forbade to be accomplished directly" (*ibid.*). It is plain, however, that it "was the *objective* of the union's secondary activities * * *, and not the *quality of the means* employed to accomplish that objective, which was the dominant factor motivating Congress in enacting" Section 8 (b) (4) (A). 81 NLBB at 812. To excise peaceful picketing from the inducement banned by Section 8 (b) (4) (A) "would practically vitiate its underlying purpose * * *." (*Ibid.*) Just as Congress was indifferent to the violent character of the inducement when it pertained to primary pressure (Board's Brief, *National Labor Relations Board v. International Rice Milling Co.*, No. 313, This Term, pp. 63-66), so it was equally indifferent to the peaceful character **[*46]** of the inducement when it promoted secondary pressure. Congress drew no distinction between inducement of a forbidden objective accomplished by coercive means and that "achieved by peaceful but oftentimes quite as effective means" (*Apex Hosiery Co. v. Leader, 310 U.S. 469, 513).* In Section 8 (b) (4) (A) it condemned both.

Furthermore, not only is the proscription of picketing necessary to the effectuation of the purpose of subdivision (A) of 8 (b) (4), but it is also necessary to the effectuation of subdivisions (B), (C), and (D), which also "would otherwise be thwarted." *Wadsworth Building Co., Inc.*, 81 NLBB 802, 815, n. 46.

This is particularly evident with respect to 8 (b) (4) (C), which prohibits every form of strike or cognate economic pressure where an object is to cause the employer to bargain with one union where another has been certified as the exclusive representative, a purpose uniformly condemned as objectionable. (Board's Brief, *National Labor Relations Board v. International Rice Milling Co.*, No. 313, this Term, p. 71 and n. 63). It is inconceivable that Congress intended to condone inducement, however peaceful, to achieve the forbidden **[*47]** objective of displacing an elected representative with a defeated minority union. Cf. *Douds v. Local 1250, 170 F. 2d 700, 701* (C.A. 2), which sustained an interlocutory injunction that prohibited inducing employees to strike, forbade picketing, and prohibited the visiting of homes of other employees for the purpose of inducing them to strike in furtherance of this objective.

B. PICKETING TO INDUCE SECONDARY STRIKES IS NOT THE EXPRESSION OP "VIEWS, ARGUMENT, OR OPINION, FOR IT IS MORE THAN SPEECH AND IS, IN ANY EVENT, VERBAL FURTHERANCE OP AN UNLAWFUL OBJECTIVE

Overlooking the distortion of the text, context, and purpose of Section 8 (b) (4) (A) which flows from removing picketing from its ban of inducement, petitioners contend that that result is compelled by the

fact that Section 8 (c) protects the expression of uncoercive "views, argument, or opinion * * * under any of the provisions of this Act * * *." The contention rests upon two mistaken assumptions: (1) picketing is pure unalloyed speech of the sort comprehended by the words "views, argument, or opinion," and (2) verbal furtherance of an unlawful objective was regarded by Congress as simply **[*48]** an expression of "views, argument, or opinion."

1. *Picketing is more than speech*: While "picketing is a mode of communication it is inseparably something more and different." *Hughes v. Superior Court, 339 U.S. 460, 464.* It "establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey." *Building Service Employees International Union v. Gazzam, 339 U.S. 532, 537.* The influence it exerts exists "quite irrespective of the nature of the ideas which are being disseminated" (*Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 503, n. 6,* quoting from *Bakery Drivers Local v. Wohl, 315 U.S. 769, 776),* and these "compulsive features inherent in picketing" give it a character beyond "mere communication as an appeal to reason" (*Hughes v. Superior Court, 339 U.S. 460, 468).*

For the same reasons, picketing is more than the expression of "views, argument, or opinion" within the meaning of Section 8 (c). Not "being the equivalent of speech as a matter of fact," picketing "is not its inevitable legal equivalent." *Hughes v. Superior Court, 339 U.S. 460, 465.* **[*49]** Since it is more than "views, argument or opinion," it cannot be assumed, in the absence of evidence to the contrary, that Congress regarded picketing as embraced within these words particularly if the result would be to immunize picketing in secondary strike situations, which Congress patently intended to outlaw. Picketing, therefore, has no status as "views, argument, or opinion" within the meaning of Section 8 (c), *Henry Shore*, 90 NLBB, No. 224, *26 LRRM 1382.* [12]
[*50]

Petitioner concedes (Br., pp. 79-80) that peaceful picketing is more than speech, and not protected by Section 8 (c), when directed at union members by a labor organization which has disciplinary powers over them. But petitioner urges that Section 8 (c) protects as speech peaceful picketing which is not coupled with such power of discipline. In the *Hughes* and *Gazzam* cases, however, like the instant case, there was no showing that the picketing was directed at persons over whom the organization conducting the picketing had powers of discipline, and the holdings in those cases that picketing was more than speech did not turn, and could not have turned, on the presence of such disciplinary power. The distinction drawn in those cases is between publication by newspaper or circular, on the one hand, and by "patrolling a picket line" on the other. *Hughes v. Superior Court, 339 U.S. 460, 465.* The rationale set forth in the *Hughes* case (*ibid.*) [13] leaves no room for the distinction which petitioner seeks to draw, either as a matter of constitutional law or of statutory construction. Petitioner's further assertion, that if such a line were drawn **[*51]** for the purposes of Section 8 (c) Section 8 (b) (4) (A) could still reach some forms of inducement by picketing, obviously does not warrant petitioner's conclusion that Congress intended to exempt from the reach of the Section other equally important forms of inducement by picketing. It is no

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[12] As it explained in *Henry Shore, 90 NLRB, No. 224, 26 LRRM 1382, 1383,* the Board in *Wadsworth Building Co., Inc., 81 NLRB 802,* "assumed that peaceful picketing was necessarily an expression of 'views, argument, or opinion' within the meaning of Section 8 (c)," but it has since decided that its assimilation of the two "was not correct." It was persuaded to this conviction by this Court's "present views on the status of picketing," and it further concluded that Congress intended no greater immunity for picketing under Section 8 (c) than "the protective scope of the Constitution."

[13] "* * * the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word."

justification for restrictive interpretation of a statute that the restriction renders the statute not wholly, but only partly, ineffective.

2. *Picketing in furtherance of am, unlawful objective is not an expression of "views, argument, or opinion*": Even if it could be regarded as "views, argument or opinion" picketing designed to bring about secondary pressure would not be protected by Section 8 (e), for the objective it promotes is unlawful, and **[*52]** there is no evidence that Congress intended to grant immunity as speech to the instigation or furtherance of unlawful conduct. In this aspect, "the purpose which [the picketing] seeks to effectuate gives ground for its disallowance." *Hughes v. Superior Court, 339 U.S. 460, 465-466.*

a. *Speech Utilized to Obtain an Unlawful Objective Is Not Protected*

Picketing which has this objective, the inducement of employees to exert secondary pressure, falls into the category of statements which are "in themselves unlawful" and "incite to unlawful action." *Thomas v. Collins, 323 U.S. 516, 536;Hughes v. Superior Court, 339 U.S. 460, 465-466.* As such, the utterance can invoke no appeal to the statutory protection of "views, argument, or opinions," for traditionally "encouraging an actual breach of law," as distinct from statements which "tend to produce unfavorable opinions of a particular statute or of law in general," finds no immunity as speech. Holmes, J., in *Fox v. Washington, 236 U.S. 273, 277.* "One may not counsel or advise others to violate the law as it stands. "Words are not only the keys of persuasion, but **[*53]** the triggers of action, and those which have no purport but to counsel the violation of law cannot by any latitude of interpretation be a part of the public opinion which is the final source of government in a democratic state." L. Hand, J., in *Masses Pub. Co. v. Patten, 244 Fed 535, 540* (S.D.N.Y.). "To hold that" the verbal "means through which" forbidden conduct was "accomplished could not be enjoined would be to render the law impotent." *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 438-439.*

In consequence, as the court below observed, the "views, argument, or opinion," in Section 8 (c) cannot be read as safeguarding the inducement of a wrong without giving its words "revolutionary significance" (R. 330), for it "would be an exception to long settled principles of civil and criminal liability" (R. 329-330): [13]

> . . . he, who provokes or instigates a wrong, makes himself a party to the wrong, and is equally liable with the perpetrator. This was apparently settled as to civil liability at least as early as the third quarter of the eighteenth century: "Not only he who does an act, but who commands or procures it to be done" **[*54]** is a trespasser.<a> As the *Restatement of Torts* <b> puts it: "for harm resulting to a third person from the tortious conduct of another, a person is liable if he (a) orders or induces such conduct.<c> One striking illustration is inducing a breach of contract by the obligor;<d> or-inducing the termination of a terminable business relation, which would have otherwise continued.<e> The same doctrine prevails as to criminal liability. The principle, long embodied in § 2 of the Criminal Code,<f> which defines as a principal, anyone who "aids, abets, counsels, commands, induces, or procures" the commission of the forbidden act,<g> goes back as far as Bracton,<h> who at folio 142 declared: "For it is colloquially said that he sufficiently kills who advises (*praecipit*) killing."<i>

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[13] Petitioners contend that the analogy to civil and criminal liability is inapt because "Section 8 (b) (4) (A) is not intended to punish for wrongs committed" (Br., p. 71), But civil liability is not "intended to punish" either; moreover, "It is not the presence of criminal sanctions which makes a * * * policy 'important public law'" (*Building Service Union v. Gazzam, 339 U.S. 532, 540).* Conduct condemned as an unfair labor practice is no less a wrong than that which falls under the more conventional rubric of crime, tort, or breach of contract.

<a> *Barker v. Braham*, 2 W. Blacks, 866, 868.

<b> § 876(a).

<c> *Ewald v. Lane, 104 Fed. (2) 222* (C.A.D.C.); *Hickman v. Taylor, 75 Fed. Supp. 528, 531, 532;* aff'd *170 Fed. (2) 327, 329* (C.A. 3).

<d> *Angle v. Chicago & St, Paul Railway Co., 151 U.S. 1;Bitterman v. Louisville & Nashville R. R. Co., 207 U.S. 205;* **[*55]** *Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303.*

<e> *Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229.*

<f> *§ 2, Title 18, U.S.C.*

<g> *Nye & Nissen United States, 336 U.S. 613, 618, 619.*

<h> *United States v. Peoni, 100 Fed. (2) 401* (C.A. 2).

<i> *Pollack & Maitland*, Vol. 11, p. 507.

It is, therefore, as the court below concluded (R. 330), "highly unlikely that by § 8 (c) Congress meant to abolish a doctrine, so deeply embedded in our civil and criminal law." Inducement of employees to exert secondary pressure, which is verbal furtherance of an unlawful objective, is thus not within the protective ambit of 8 (c).
[*56]

Moreover, there is in this case no commingling of legal and illegal purpose so as conceivably to protect the utterance as an expression of "views, argument, or opinion" because of its "double character" (R. 330, 331-332). [13] As in *Giboney v. Umpire Storage and Ice Co., 336 U.S. 490, 502,* there is no occasion to consider "the possibility of separating the picketing conduct into illegal and legal parts," for its "sole, unlawful immediate objective" was to induce a violation of law. No immunity, statutory or constitutional, extends to "speech or writing used integral part of conduct in violation of a valid * * * statute" *(336 U.S. at 498).*
[*57]

b. *The Unlawful Objective*

The wrong defined by Section 8 (b) (4) (A) is for a labor organization or its agents to draw a neutral employer into a labor controversy through the exertion of secondary pressure on him. It is equally a wrong for a labor organization "to induce or encourage the employees of any employer" to take such action. Contrary to petitioner's contention (Br., p. 72), the circumstance that, unlike a labor organization, employees may individually yield to the inducement without themselves being chargeable with an unfair labor practice does not legalize the secondary pressure which the inducing union thus achieves.

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[13] Cf.Wolferman v. Root, 356 Mo. 976, 982, 204 S. W. 2d 733, 736, certiorari denied, ***333 U.S. 837:*** "The evidence [does] disclose that one of the purposes for the picketing is for giving information to the public. While we assume that purpose is lawful still when it is coupled, as it is here, with unlawful purposes, the fact one of several purposes is lawful does not make the picketing lawful. Picketing for both lawful and unlawful purposes is unlawful. See ***Restatement, Torts, § 796***. Cf. *Baush Machine Tool Co. v. Hill, 231 Mass. 30, 120 N. E. 188; Folsom v. McNeil, 235 Mass, 269, 126 N. E. 479.*"

In the form in which Senator Taft originally proposed Section 303 of Title III, Labor Management Relations Act, 1947, the damage suit analogue of 8 (b) (4) (A), it was made "unlawful" for "any person" to engage in or induce secondary pressure. [14] In opposing the measure, Senator Morse objected that (93 Cong. Rec. 4839-40, in 2 Leg. Hist. 1357-1358):

> * * * it * * * makes every person who participates in a strike for one of the outlawed objectives liable to damage suits. In other words, the proposal * * * would open wide the doors **[*58]** of the Federal courts to damage suits against any person who engaged in a strike or attempted to persuade other employees to engage in a strike for one of the prohibited objectives.
>
> The proposal very definitely would take us back at least 40 years and we would again have the spectacle of mass suits against employees, similar to the infamous Danbury Hatters case. * * *
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> * * * *
>
> It also should be pointed out that the substitute proposal is inconsistent with the present provision in the bill allowing a union to be sued for breach of contract. Section 301 of the bill permits suits against labor organizations only, whereas the substitute proposal allows damage suits against "any person." Also, Section 301 limits recovery to the assets of the union. The substitute allows the attachment of employees' bank accounts and all their property. [15]

[*59]

In reply, Senator Taft stated: "I am amending the proposal, by striking out the word 'person', * * * and inserting in lieu thereof 'labor organization', so that action will be open only against labor organizations promoting this type of strike." [16] To prevent suits "against individuals," [17] Senator Taft submitted an amended proposal deleting the word "person" and substituting "labor organization" in its stead, [18] and in that form it was passed. [19]

The refusal of Congress to subject individual employees to the pecuniary hazards of damage suits was complemented by freeing employees as individuals from Board process. The inclusion in the House bill [20] of "an employee" among those chargeable with unfair labor practices was deleted in conference. [21] It manifested the traditional reluctance of **[*60]** Congress to expose individual employees to any risk of involuntary servitude, which might be entailed in a Board order requiring individual desistance from a refusal to work, a concern reflected in Section 502, Title V, Labor-Management Relations Act, 1947:

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[14] 93 Cong. Rec. 4770, in 2 Leg. Hist. 1346.

[15] Section 301 (b), Title III, Labor Management Relations Act, 1947, provides that: "Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets."

[16] 93 Cong. Rec. 4840, in 2 Leg. Hist. 1358.

[17] 93 Cong. Rec. 4843, in 2 Leg. Hist. 1365.

[18] 93 Cong. Rec. 4858, in .2 Leg. Hist. 1370.

[19] 93 Cong. Rec. 4874-75, in 2 Leg. Hist. 1399-1400.

[20] H. R. 3020, 80th Cong., 1st Sess., Sec. 8 (b), in 1 Leg. Hist. 178; H. Rep. No. 245, 80th Cong., 1st Sew. 30, in 1 Leg. Hist. 321.

[21] H. Rep. No. 510, 80th Cong., 1st Sess. 42, in 1 Leg. Hist 546.

> Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

Except for the addition of the last clause pertaining to hazardous employment, this provision is identical with Section 2 (Tenth) of the Railway Labor Act, [22] of which this Court stated: "The purpose of this limitation was manifestly to protect the individual liberty of employees and not to affect proceedings in case of **[*61]** combinations or group action." *Texas & N. O. R. Co. v. Brother-hood of Ry. & S. Clerks*, 281 IT. S. 548, 566-567. [23] And because the sanctions of the Board can be directed only against a labor organization or its agents, the Act is invulnerable to an objection that it compels servitude by individual employees, [24] an additional reason for freeing them from direct chargeability with unfair labor practices. **[*62]**

It is plain, therefore, that the immunity from Board processes of individual employees who engage in secondary pressure is explained by the fact that Congress considered it unnecessary and undesirable to subject them as individuals to legal sanctions. It in no way reflects a congressional judgment that the secondary pressure achieved by the successful inducement of employees is lawful. [25] Unions which induce employees to engage

in secondary pressure are performing an unlawful act, namely, utilizing a work stoppage **[*63]** to draw a neutral employer into a labor dispute. Paraphrasing the language of this Court in *United States v. Women's Sportswear Assn., 336 U.S. 460, 464,* the immunity of individual employees to suit "cannot he utilized as a cat's-paw to pull" labor organizations' "chestnuts out of the" secondary boycott "fires."

In view of the clear evidence that Congress' reasons for according immunity to individual employees who succumb to inducement to engage in secondary pressure were unrelated to its reasons for declaring union inducement of secondary pressure a wrong, petitioners' argument (Br. 71-72), reduces to the proposition that Congress could not prohibit the inducement unless it also prohibited employees from yielding to it. That contention is squarely refuted by *International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 479,* and *Hughes v. Superior Court, 339 U.S. 460, 468.* In *Hughes*, inducement of proportional racial hiring was properly forbidden even though the State does not "forbid the employer to adopt such a quota

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[22] 48 Stat. 1185, 1189, *45 U. S. C. 151, 152* (Tenth).

[23] See also, *United Auto Workers v. Wisconsin Employment Relations Board, 336 U.S. 245, 251; France Packing Co. v. Bailey, 166 F. 2d 751, 753-754* (C. A. 3).

[24] *Local 74 v. National Labor Relations Board, 181 F. 2d 126, 132,* certiorari granted, No. 85, this Term; ***National Labor Relations Board v. National Maritime Union, 175 F. 2d 686, 692*** (C. A. 2), certiorari denied, ***338 U.S. 954;*** *National Labor Relations Board v. Wine, Liquor & Distillery Workers Union, 178 F. 2d 584, 587-588* (C. A. 2); *Printing Specialties & Paper Converters Union v. LeBaron, 171 F. 2d 331, 334, n. 2* (C. A. 9).

[25] This is particularly evident in that, though not subject to a damage judgment or a Board order, the employees who engage in secondary pressure may be vulnerable to discharge or discipline for engaging in unprotected concerted activity (*Cf. United Auto Workers v. Wisconsin Employment Relations Board, 336 U.S. 245, 255-257, 260 and n. 15).* The Board has not yet had occasion to pass upon this question (See *Deena, Artware, Inc., 86 NLRB 732, 735, n. 7).*

system of his own free will" *(339 U.S., at 468).* And in *Hanke*, inducement of self-employed **[*64]** persons to maintain certain business hours was properly forbidden even though such persons could voluntarily agree to the proposed arrangement *(339 U.S., at 479).* In neither case was it unlawful for the persons induced to refuse to cross the picket line. No less than the states, Congress is not required to prohibit the employees' "voluntary acquiescence in the demands of the union in order that it may choose to prohibit the right to secure submission through picketing" (*Hanke* case, *339 U.S., at 479),* for Congress may "address itself to the obvious means toward such end" without outlawing its every manifestation (*Hughes* case, *339 U.S., at 468).* That Congress, like the states in those cases, in fact chose to illegalize the inducement without making individual submission illegal, is abundantly established.

C. THE REMEDIAL FUNCTION OF SECTION 8(C) IS TO PROTECT UNCOERCIVE SPEECH IN FURTHERANCE OP A LAWFUL OBJECT

Nothing in the history of Section 8 (c) suggests that verbal furtherance of secondary pressure is protected by it; indeed, no legislative discussion of either Section 8 (c) or 8 (b) (4) (A) adverted to the other. This mutual **[*65]** silence as to an interrelation between the two confirms the view that 8 (c) does not except the inducement banned by 8 (b) (4) (A). Contrary to petitioners' contention (Br., p. 73), this result does not work any disparity in "equal freedom to both employers and unions."

Mr. Justice Jackson has said that the Act assures "Free speech on both sides and for every faction on any side of the labor relation * * *. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objection-able working conditions. The employer * * * [is] free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men." [26] The purpose of Section 8 (c) was to make this clear. Thus, in an organizational campaign, just as a union is free to persuade an employee to join it, so an employer is at liberty to dissuade Mm from that course, and both are required to desist from an abuse of speech. See 93 Cong. Rec. 4020, 4433-34, in 2 Leg. Hist. 1023, 1201-02. But the uncoercive speech which Section 8 (c) safeguards, whether by employers or labor organizations, is verbal furtherance of a *lawful* end, and not **[*66]** incitement to illegal action expressly prohibited by the Act. Absence of immunity for union inducement of secondary pressure finds its counterpart in absence of immunity for an employer's verbal furtherance of such practices as the creation of a company-dominated labor organization (*National Labor Relations Board v. Kropp Forge Co., 178 F. 2d 822* (C.A. 7), certiorari denied, *340 U.S. 810),* or the undercutting of a bargaining representative (*May Department Stores v. National Labor Relations Board, 326 U.S. 376, 381-386).* [27] "Employers still may not, under the guise of merely exercising their right of free speech, pursue a course of conduct designed to restrain and coerce their employees in the exercise of rights guaranteed by the Act." *National Labor Relations Board v. Gate City Cotton Mills*, 167 E. 2d 647, 649 (C.A. 5). Neither may unions pursue an unlawful course of conduct "merely because the conduct was in part initiated, evidenced, or carried out by

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[26] Mr. Justice Jackson, concurring in *Thomas v. Collins, 323 U.S. 516, 547.*

[27] So too, it could hardly be argued successfully that Section 8 (c) would protect an employer who incited employees, though without threats or promise of benefit, to commit an assault upon a union organizer or upon union members. Cf. *National Labor Relations Board v. New Era Die Co., 118 F. 2d 500, 504* (C.A. 3); *National Labor Relations Board v. Goodyear Tire & Rubber Co., 129 F. 2d 661, 664* (C.A. 5); *Clover Fork Coal Co. v. National Labor Relations Board, 97 F. 2d 331, 335* (C.A. 6); *National Labor Relations Board v. Sunshine Mining Co., 110 F. 2d 780, 792* (C.A. 9), certiorari denied, ***312 U.S. 678.*** In a case decided after the amended Act the Court of Appeals for the Sixth Circuit held that an employer violated the Act by "soliciting" various citizens committees "through the dissemination of anti-union propaganda" to commit acts impinging on employee organizational rights and enforced a Board order prohibiting the employer from engaging in such conduct in the future. *National Labor Relations Board v. Salant & Salant, Inc., 183 F. 2d 462,* enforcing *66 NLRB 24, 44, 111.*

means of language, either spoken, written, or printed." [28] There is, therefore, no disparity between unions and employers in the application of Section 8 (c).
[*67] [*68]

That Section 8 (c) presupposes the existence of a lawful end, and not the inducement of prohibited conduct, is apparent from the actual problem of employer speech, as it existed before the amendment of the Act, to which Section 8 (c) was addressed. An employer's dissuasion of employee participation in organizational activity involves no unlawful end, for employees may legally forego such participation. The risk entailed by permitting such employer dissuasion is that the privilege may be abused and verbal coercion practiced to realize the lawful end. With this in mind, Congress forbade utterance which contains a "threat of reprisal or force or promise of benefit." It thereby struck the balance between proper and improper speech for a lawful purpose at that point where the utterance assumes overtones of compulsion or favor derived from an attempt, openly or covertly, to bulwark pursuasion by an exertion of economic or other types of coercive power.

It thus affirmed the established principle that the "use **[*69]** of economic power over men and their jobs to influence their action is more than the exercise of freedom of speech. Mere suggestions, when made by one who holds the power of economic coercion in a setting conducive to the exercise of that power, may have the unwarranted effect of exerting a coercive influence to which freedom of speech does not extend." *National Labor Relations Board v. Continental Oil Company, 159 F. 2d 326, 330* (C.A. 10). [29] In consequence, "pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways." *National Labor Relations Board v. Virginia Electric & Power Company, 314 U.S. 469, 477.* For although "employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment's guaranty * * * when to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed," *Thomas v. Collins, 323 U.S. 516, 537-538;May Department Stores v. National Labor Relations Board, 326 U.S. 376, 386.* Thus, in proscribing utterances which contain "threats **[*70]** of violence, intimation of economic reprisal, or offers of benefit" (S. Rep. No. 105, 80th Cong., 1st Sess., 23, in 1 Leg. Hist. 429), Section 8 (c) in its substantive aspect, as explained by Senator Taft, "in effect carries out approximately the present rule laid down by the Supreme Court of the United States. It freezes that rule into law itself * * *." 93 Cong. Record 3837, in 2 Leg. Hist. 1011. *National Labor Relations Board v. LaSalle Steel Co., 178 F. 2d 829, 834-835* (C.A. 7), certiorari denied, *339 U.S. 963;National Labor Relations Board v. Bailey Co., 180 F. 2d 278, 280* (C.A. 6).
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[28] *Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 502.*

[29] Compare the concurring opinion of Mr. Justice Douglas, in which Mr. Justice Black and Mr. Justice Murphy joined, in *Thomas v. Collins, 323 U.S. 516, 543-544:* "No one may be required to obtain a license in order to speak. But once he uses the economic power which he has over other men and their jobs to influence their action, he is doing more than exercising the freedom of speech protected by the First Amendment." The necessity for reconciling the ambivalent character of employer speech has found frequent expression of which the opinion in *Continental Box Co. v. National Labor Relations Board, 113 F. 2d 93, 97* (C.A. 5) is illustrative: "The employer has the right to have and to express a preference for one union over another so long as that expression is the mere expression of opinion in the exercise of free speech and is not *the use of economic power to coerce, compel or buy* the support of the employees for or against a particular labor organization." (Emphasis supplied.)

Since it has never been the rule of this Court that verbal inducement of unlawful conduct is without more protected speech (*Giboney v. Empire Storage and Ice Co., 336 U.S. 490, 498-502;supra*, pp. 36-39), [30] Section 8 (e) in embodying "the present rule laid down by the Supreme Court" does not immunize inducement of forbidden conduct. Rather, in insuring "both to employers and labor organizations full freedom to express their views to employees on labor matters" (S. Rep. No. 105, 80th Cong., 1st Sess., 23, in 1 Leg. Hist. 429), the true remedial objective of Section 8 (c) is, assuming a lawful end, to preclude a practice whereby utterances are condemned as coercive, or are considered as evidence, because of the commission of other unfair labor practices, remote in time and unconnected by circumstances to the utterances. Thus, as explained by the House Report, "if an employer criticizes a union, and later a foreman discharges a union official for gross misconduct," the Board may not "'infer' from what the employer said, *perhaps long before*, that the discharge was for union activity." H. Rep. No. 245, 80th Cong., 1st Sess., 33, in 1 Leg. Hist. 324. **[*72]** (Emphasis supplied.) As stated in the Senate Report, the Board may not hold, "speeches by employers to be coercive if the employer was found guilty of some other unfair labor practice, *even though severable or unrelated*." S. Rep. No. 105, 80th Cong., 1st Sess., 23, in 1 Leg. Hist. 429. (Emphasis supplied.) "The necessity for this change in the law," explained the House Conference Report, was to prevent "using speeches and publications of employers concerning labor organizations and collective bargaining arrangements as evidence, *no matter how irrelevant or immaterial*, that some later act of the employer had an illegal purpose." H. Rep. No. 510, 80th Cong., 1st Sess., 45, in 1 Leg. Hist. 549. (Emphasis supplied.) The ultimate evolution of Section 8 (c) had its origin in the need, as succinctly stated by Senator Ellender, one of the conferees, of precluding the condemnation of "a casual speech," "*no matter how remote or separable*," as "a part of the pattern of unfair labor practices." 93 Cong. Record 4137, in 2 Leg. Hist. 1066. (Emphasis supplied.) The essence of Section 8 (c), therefore, is to establish in statutory form a rule of relevance in determining whether utterances, **[*73]** as means to a lawful end, are coercive. [31] It reflects no solicitude for verbal furtherance of an unlawful end.

[*74]

Petitioners contend, nevertheless, that Section 8 (c) requires that the character of an employer's utterance be determined by looking to the statement alone, without regard to its context; that equality requires a like treatment of union utterances; and that, in this case, looking to the picketing alone, nothing detracts from its innocent nature. Br., pp. 73-78. However, Section 8 (c) does not preclude the consideration of circumstances connected with and relevant to the utterance, in order to determine its meaning. *National Labor Relations Board v. Kropp Forge Co., 178 F. 2d 822, 827-829* (C.A. 7), certiorari denied, *340 U.S. 810,* and cases cited. [32] "Whether words import a "threat of reprisal or force or promise of benefit," or are

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[30] See also,*American Communications Assn. v. Douds, 339 U.S. 382, 394* ("If it is to survive [government] must have power to protect itself against unlawful conduct and, under some circumstances, *against incitements to commit unlawful acts*.") (Emphasis supplied.)

[31] Giving effect to the purpose of 8(c), the Board holds that an employer's statements "which contain no threat of coercion "do not acquire a coercive character because the [employer] had on another occasion committed unfair labor practices."*Mylan-Sparta Co., Inc., 78 NLRB 1144, 1145; Tygort Sportswear Co., 77 NLRB 613, 614; Bailey Company, 75 NLRB 941, 942,* enforced, *180 F. 2d 278* (C.A. 6). The further objective of Section 8(c), to eliminate the "compulsory audience" doctrine, namely, that an employer's speech is coercive because the employees were ordered by the employer to listen to it (S. Rep. No. 105, 80th Cong., 1st Sess., 23, in 1 Leg. Hist. 429, 93 Cong. Rec. 4137, in 2 Leg. Hist. 1066), has likewise been effected. *Babcock & Wilcox Co., 77 NLRB 577, 578.*

[32] See also,*National Labor Relations Board v. O'Keefe & Merritt Mfg. Co., 178 F. 2d 445, 448* (C.A. 9) ("We realize that words are not to be looked at in a vacuum, but in the light of all the circumstances surrounding their utterance."); Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 Harv. L. Rev. 1, 17 (1947) ("Section 8 (c) itself contains nothing to suggest that in determining the presence of a

directed to an unlawful end, cannot be determined in isolation from the setting in which they are uttered, for, as Mr. Justice Holmes observed, "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." [33]

[*75]

Consideration of the legislative genesis of Section 8 (c) confirms this view. Section 8 (d) of the House bill provided that: [34]

> * * * the following shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act: (1) Expressing any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, if it does not *by its own terms* threaten force or economic reprisal. [Emphasis supplied.]

Section 8 (c) of the Senate bill provided that:

> The Board shall not base any finding of unfair labor practice upon any statement of views or arguments, either written or oral, if such statement contains *under all the circumstances* no threat, express or implied, of reprisal or force, or offer, express or implied, of benefit * * *. [35] [Emphasis supplied.]

[*76]

Because in conference Section 8 (c) in its final form was avowedly evolved, as is apparent from its wording, from the House provision and in substitution for the Senate provision, [36] the additions to and deletions from the House provision are of the utmost significance in ascertaining the meaning to be ascribed to the final form of the section, Apart from the addition of "promise of benefit" within the category of prohibited utterances, the single significant change in the House provision was the deletion of the phrase "by its own terms." The clear implication of this deletion is that it signifies recession from the view that the meaning of utterances was to be determined by consideration of the bare words alone, without reference to the circumstances surrounding their utterance.

[*77]

This interpretation is not affected by the failure to include in Section 8 (c) in its final form the phrase, "under all the circumstances," contained in the Senate provision. Explaining the conference agreement, Senator Taft stated that that phrase was deemed "ambiguous and might be susceptible of being construed as approving certain Board decisions which have attempted to circumscribe the right of free speech where there were also findings of unfair labor practices" (93 Cong. Rec. 6443, in 2 Leg. Hist. 1541); in short, that the phrase might invite re-introduction of a supposed practice of condemning utterances as coercive because of the commission of other unfair labor practices remote in time and unconnected by circumstances to the utterances (93 Cong. Rec. 6859-60, in 2 Leg. Hist. 1624). During the debate, in

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threat or promise the Board is to shut its eyes to extrinsic circumstances and look only to the naked words. In the labor field, as elsewhere, language takes on its meaning from its context.")

[33] *Towne v. Eisner, 245 U.S. 418, 425.*

[34] H. R. 3020, 80th Cong., 1st Sess., Sec. 8 (d) (1) (April 17, 1947), in 1 Leg. Hist. 183.

[35] H. R. 3020, 80th Cong., 1st Sess., Sec. 8 (c) (May 13, 1947), in 1 Leg. Hist. 242.

[36] H. Conf. Rep. No. 510 80th Cong., 1st Sess., 45, in 1 Leg. Hist. 549; 93 Cong. Record 6443, 6859, in 2 Leg. Hist. 1540-41, 1624.

response to a query whether statements may be considered in relation to acts to determine meaning, Senator Taft went on to explain, "All these **[*78]** questions involve a consideration of the surrounding circumstances. It would depend upon the facts. * * * There would have to be * * * circumstances to tie in with the act of the employer." 93 Cong. Rec. 6446, in 2 Leg. Hist. 1545. Consequently, where a relevant factual nexus exists between expression and conduct, the meaning of the statement may be ascertained in relation to the circumstances of its utterance.

Thus, Section 8 (c) does not require the Board to consider the picketing in this case in isolation from its objective. Looked at in context, the picketing is inducement of secondary pressure, and to inducement of this character Section 8 (c) affords no immunity.

D. PROHIBITION OP PICKETING IN FURTHERANCE OP SECONDARY PRESSURE INVOLVES NO UNCONSTITUTIONAL ABRIDGMENT OP FREE SPEECH

Contrary to petitioners' contention (Br. pp. 60-68), prohibition of picketing in furtherance of secondary pressure entails no unconstitutional abridgment of free speech. In accord with the court below (R. 331-332), [37] the Courts of Appeals for the Sixth, [38] Ninth, [39] and Tenth [40] Circuits have upheld the validity of Section 8 (b) (4) (A). [41] As the court below stated (R. 332), **[*79]** " Congress, in the search for a compromise between the conflicting interests of employees in collective bargaining and that of neutrals in avoiding involvement in quarrels not their own, decided to draw a line at secondary boycotts; and the propriety of decision is not for us."
[*80]

The substantive evil of secondary pressure is on a level of importance with the maintenance of self-employer economic units in *International Brotherhood of Teamsters v. Hanke, 339 U.S. 470,* the freedom from coercion in employee selection of bargaining representatives in *Building Service Employees Union v. Gazzam, 339 U.S. 532,* the prohibition of pressure to secure proportional employment on racial grounds in *Hughes v. Superior Court, 339 U.S. 460,* and the restraint of trade in *Giboney v. Empire Storage and Ice Co., 336 U.S. 490.* No constitutional difference exists, in terms of governmental appraisal of need and competing interests, between the end to which Congress addressed itself in Section 8 (b) (4) (A) and the ends which were in those cases the subject of state concern. Indeed, *Giboney* is controlling, for except that it carried the label of a different substantive offense, the conduct there "amounted to secondary boycott." L. Hand, C. J., in *United States v. Dennis, 183 F. 2d 201, 210* (C.A. 2), certiorari granted, *340 U.S. 863;* see also, *Carpenters & Joiners Union v. Bitters' Cafe, 315 U.S. 722.* **[*81]**

Here too, no less than in those cases, the inducement through picketing had a clear and present propensity of working its mischief, as its immediate effect in this case shows (*supra*, pp. 8-9). Verbal furtherance of

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[37] See also, *National Labor Relations Board v. Wine, Liquor, & Distillery Workers Union, 178 F. 2d 584, 587-588* (C.A. 2).

[38] *National Labor Relations Board v. Local 74, 181 F. 2d 126, 132* (C.A. 6), certiorari granted, No. 85, This Term.

[39] *Printing Specialties and Paper Converters Union v. Le-Baron, 171 F. 2d 331, 333-335* (C.A. 9).

[40] *National Labor Relations Board v. United Brotherhood of Carpenters & Joiners, 184 F. 2d 60, 62* (C.A. 10), pending on petition for certiorari, No. 387, This Term. *United Brotherhood of Carpenters & Joiners v. Sperry, 170 F. 2d 863, 868-869* (C.A. 10).

[41] The constitutionality of Section 8 (b) (4) (C) (*Douds v. Local 1250, 170 F. 2d 700, 701* (C.A. 2)), and Section 8 (b) (4) (D) (***Los Angeles Building and Construction Trades Council v. LeBaron, 27 LRRM 2184*** (C.A. 9, Dec. 8, 1950)) has likewise been sustained.

an unlawful end, where the risk of the materialization of the wrongdoing is substantial and real, as the legislative judgment confirming the facts of industrial life declares it to be here, is outside the protection of the constitutional guarantee of free speech. And "restrictions on particular kinds of utterances, if enacted by a legislature after appraisal of the need, come to this Court 'encased in the armor wrought by prior legislative deliberation.'" *American Communications Association v. Bonds, 339 U.S. 382, 401.*

finally, there is no constitutional infirmity in Section 8 (b) (4) (A) by reason of a legislative judgment resting exclusively upon the absence of an immediate employer-employee relationship as the basis for the statutory curb. Cf. *Building Service Employees Union v. Gazzam, 339 U.S. 532, 539;International Brotherhood of Teamsters v. Hanke, 339 U.S. 470, 479-480.* The existence of secondary **[*82]** pressure in no way turns on the criterion of employment relationship. Thus, in *National Labor Relations Board v. International Rice Milling Co.*, No. 313, this Term, the picketing was primary and permitted, although none of the employees of the primary employer participated in it or left their employ to strike. And in this ease, the picketing "was secondary, not because of the absence of an employer-employee relationship, but because the inducement was an unrestricted and undifferentiated involvement of employers other than the primary employer.

Petitioners claim (Br. 60-68), that Congress can no more disregard the interdependence of economic interest of those engaged on a common construction project, than it can base legislative judgment upon the absence of an employer-employee relationship. But a construction job is not so indivisible that Congress may not rationally treat separately the participation therein of independent entrepreneurs, each of whom is entitled to protection against secondary pressure. (Board's Brief, *National Labor Relations Board v. Denver Building & Construction Trades Council*, No. 393, this Term, pp. 51-61). The division does exist in fact, **[*83]** and it is as economically significant, at least, as the economic interdependence between the enterprises. Whether to base policy upon the one consideration or the other is a matter for the legislature, and not for the courts applying constitutional limitations. [42]
[*84]

Petitioners' analysis (Br. 45-51), of the economic interdependence between craftsmen of different trades, employed by separate employers and members of different unions, when working on a common construction project, bears close resemblance to Mr. Justice Brandeis' analysis of the economic interdependence which exists between employees engaged in the same industry, members of the same union, who at different stages of manufacture, and at different plants owned by separate employers, produce, fabricate, and install the same goods. *Duplex Go. v. Deering, 254 U.S. 443, 479;* see also *Gold finger v. Feintuch, 276 N. Y. 281, 11 N. E. 2d 910, 913,* quoted in our Brief in the *Denver* case, No. 393, pp. 55-56, n. 28. Mr. Justice Brandeis, and some courts subsequently, regarded the "centralization in the control of business" *(254 U.S. at 482),* and the resultant interrelationship of economic interest between employee groups, as justification for the refusal of a union to permit its members to work on goods produced by non-members. See *254 U.S. at 482-483.* The same factors would, in this view, justify the

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[42] Except for that part of this argument which relies upon the difference between picketing and speech as such (*supra*, pp. 33-35), this discussion applies equally to all forms of verbal furtherance of secondary pressure, at least where the inducement raises a substantial risk that it will bring about the wrong. An example is the blacklisting of a neutral employer to compel him to cease doing business with a primary employer (*Wadsworth Building Co., Inc., 81 NLRB 802, 816,* enforced, *184 F. 2d 60, 62* (C. A. 10), pending on petition for certiorari, No. 387, this Term), a type of publication unquestionably subject to restraint when employed to further a secondary boycott (*Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 435-439;* and see, *Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 608-609, 612-613).* See also, the discussion of the *Allen-Bradley* case, *supra*, pp. 25-27.

analogous refusal **[*85]** of a union to permit its members to work on a project where non-union employees of other employers were engaged. But the legislative history set forth in our *Denver* Brief, pp. 54-60, shows beyond question that Congress did not regard these factors as sufficient justification for secondary pressure. Pertinent, therefore, is the admonition with which Mr. Justice Brandeis concluded his opinion in the *Duplex* case, *254 U.S. at 488:*

> Because I have come to the conclusion that both the common law of a State and a statute of the United States declare the right of industrial combatants to push their struggle to the limits of the justification of self-interest, I do not wish to be understood as attaching any constitutional or moral justification to that right.

IV. THE BOARD'S ORDER IS PROPER

The Board's order in this case requires petitioners and their agents to cease and desist from inducing the employees of Deltorto, or any employer, to strike or concertedly refuse to perform services in the course of their employment, where an object is to compel Giorgi, or any other employer or person, to cease doing business with Langer (*supra*, pp. 11-12). Petitioners **[*86]** contend that this order is too broad on the ground that "There was no finding by the Board that the acts of petitioners on the Giorgi job will probably be applied on jobs of other employers" (Br., pp. 80-81). [43]
[*87]

The Board's order is tailored to the precise violation found and does no more than enjoin petitioners from exerting the same kind of economic pressure against Langer through other employers as they exerted upon Langer through Giorgi and Deltorto in the instant case. The order is squarely within the principle that: "To justify an order restraining other violations," in addition to that exact offense found, "it must appear that they bear some resemblance to that which the [offender] has committed or," disjunctively, "that danger of their commission in the future is to be anticipated from the course of Ms conduct in the past." *National Labor Relations Board v. Express Publishing Co., 312 U.S. 426, 437.* See also, *May Department Stores Co. v. National Labor Relations Board, 326 U.S. 376, 386-393; Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 51-52.* To confine the order to exertion of secondary pressure through Giorgi and Deltorto, and to fail to extend it to other employers, is ineffectual, for it leaves Langer and other employers who do business with him exposed to the very evil already manifested through Giorgi **[*88]** and Deltorto. So long as petitioners' dispute with Langer continues unsettled, or if it recurs after settlement, all who do business with Langer, and not DiGiorgi and Deltorto alone, are potential targets of petitioners' secondary pressure. The order appropriately safeguards them as well as Giorgi and Deltorto, for where "a clear violation of law" is disclosed, "it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." *International Salt Co. v. United States, 332 U.S. 392, 400.*

CONCLUSION

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[43] Petitioners fortify their contention by reliance upon the Board's dismissal of that part of the complaint alleging their exertion of secondary pressure to keep Langer from performing services on another construction job (R. 262-265). However, Petitioners' action with respect to that incident was to*threaten an employer* that the job would be picketed if Langer performed services there, and it was for the reason that Section 8(b)(4)(A) does not prohibit inducement directed to an employer that the complaint was dismissed in that respect. Board Br., *National Labor Relations Board v. International Rice Milling Co.*, No. 313, this Term, p. 29, n. 20. However, the relevance of this incident for present purposes would be to show that petitioners were interfering with Langer's business wherever it took place, and that a broad order is consequently appropriate.

For the reasons stated, it is respectfully submitted that the decision below should be affirmed.

PHILIP B. PERLMAN,

Solicitor General.

GEORGE J. BOTT,

General Counsel,DAVID P. FINDLING,

Associate General Counsel,MOZART G. RATHER,

Assistant General Counsel,BERNARD DUNAU,

Attorney,National Labor Relations Board.

FEBRUARY, 1951.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and an employee in the County of Alameda, State of California. I am over the age of eighteen years and not a party to the within action; my business address is1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

I hereby certify that on January 28, 2019, I electronically filed the foregoing **MOTION FOR JUDICIAL NOTICE** with the United States Court of Appeals, Ninth Circuit, by using the Court's CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Notice of Electronic Filing by the Court's CM/ECF system.

I certify under penalty of perjury that the above is true and correct. Executed at Alameda, California, on January 28, 2019.

/s/ Karen Kempler
Karen Kempler